

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FRITO-LAY NORTH AMERICA, INC. * Civil Docket No.
* 4:12-CV-74
VS. * Sherman, Texas
*
* February 11, 2013
MEDALLION FOODS, INC, ET AL * 2:25 P.M.

TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE JUDGE AMOS MAZZANT
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Proceedings recorded by mechanical stenography,
transcript produced on CAT system.)

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11 *****

12 P R O C E E D I N G S

13
14 COURT SECURITY OFFICER: All rise.
15 (Jury panel in.)

16 THE COURT: Please be seated.

17 Ladies and Gentlemen, thank you so much
18 for your attendance today. I will have the clerk to go
19 ahead and call the 10 jurors that will serve in this
20 case.

21 When your name is called, please come
22 forward. Mr. Strandlien here and Mr. Smith will direct
23 you and be seated in the jury box.

24 COURTROOM DEPUTY: Deborah Owen; Toni
25 Maddox; Sarah Stobaugh; Stephanie Lanvers; Carie Seelye;

1 Larry Paul; Joseph Shimek; Glenn Bisset; Latricia
2 Harjes; Debbie Windham.

3 THE COURT: Congratulations, Ladies and
4 Gentlemen. If you will stand and raise your right hand
5 to be sworn in as the jury for this case.

6 (Jury sworn.)

7 THE COURT: Thank you very much. You can
8 stay standing.

9 I am going to release you back to the
10 jury room. There are a couple of matters to take up
11 with counsel. When you can come out, I will bring you
12 back out to do the preliminary instructions as well as
13 opening statement of the attorneys.

14 But, again, this is something you're
15 going to hear me say time and time again. Do not
16 discuss anything about the case among yourselves. And
17 go have a good time back in the jury room, but don't
18 discuss the case or what's happening here.

19 So if you want to go ahead and go back,
20 and there will be things like notepads the CSO will give
21 you, and I will tell you about those in the preliminary
22 statements.

23 So thank you. You are released back to
24 the jury room.

25 COURT SECURITY OFFICER: All rise for the

1 jury.

2 (Jury out.)

3 THE COURT: Okay. Thank you. You can be
4 seated.

5 For everyone else that did not get
6 selected for this jury, I just want to thank you for
7 your participation. Again, without citizens willing to
8 participate in our system, this couldn't function. And
9 I just really do appreciate you taking your time today,
10 and I know you didn't have a choice, but it really is an
11 important function.

12 If you try to find who would be the best
13 jurors in this case, and despite your not being selected
14 for this case, who knows, you'll be called again. And
15 there is probably a case out there that you would be a
16 perfect juror for.

17 So at this time, you are free to leave or
18 stay at your pleasure. I think the CSOs will have
19 notes, if you need those for your work. And you are
20 free to leave now at your pleasure.

21 Thank you.

22 (Jury panel excused and leaves the
23 courtroom.)

24 THE COURT: Be seated.

25 Let's talk about the preliminary

1 instructions now, and I will give you some general
2 guidelines that we will do the preliminary statements or
3 my preliminary instructions. The longer you take on
4 that, we are stopping at 5:00 o'clock. So whatever time
5 is left, we are going to divide the time equally from
6 the time I finish the preliminary instructions.

7 We're going to read those and play the
8 video. I'm just putting you on notice now that I'm not
9 keeping the jury past 5:00 o'clock, so we go 9:00 to
10 5:00. Some have to drive a-ways. Okay.

11 MR. HILL: Your Honor, with regard to the
12 preliminary instructions, we have no objections to the
13 preliminary instructions as drafted by the Court on
14 behalf of the Defendants.

15 We note that Frito-Lay submitted a number
16 of changes. We oppose all of them. We would ask that
17 the Court in the interest of time not entertain those
18 things piece-by-piece, but that the Court stick with its
19 preliminary instructions as the charge to be given to
20 the jury.

21 THE COURT: Okay. Mr. Durst?

22 MR. DURST: Sure.

23 THE COURT: Just so you know, if we go
24 through these one-by-one, that's fine. I'm not going to
25 prohibit you from doing so. This is just going to come

1 off your opening statements, your time for opening
2 statements, because if we have to go back and make the
3 changes, so it's going to be in the -- I'm giving you a
4 heads-up. I'm just giving you full notice.

5 MR. DURST: Sure, Your Honor.

6 THE COURT: That's fine.

7 MR. DURST: The ones that matter the most
8 to us are the ones where there are claims that are
9 not -- for instance, the -- there is an inclusion in the
10 Court's draft of saying -- of abandonment on the Defense
11 side of the case, but not on Frito-Lay's side of the
12 case.

13 So the easiest and quickest approach
14 there is just to delete that altogether; otherwise, we
15 need to have an articulation of Frito-Lay's side of that
16 issue. And I believe that occurs, Your Honor, on Page
17 No. 5 of the Court's draft.

18 THE COURT: And Page 6?

19 MR. DURST: Yes. Yes, abandonment is on
20 Page 6. The easiest thing I suspect is just to strike
21 any reference at all, one side or the other, on
22 abandonment.

23 THE COURT: That the Defense had raised.

24 MR. DURST: Then, Your Honor, we would
25 request that -- that something about our position on

1 that be included in the preliminary instructions as
2 well. And if you look at the bottom of Page 5, we have
3 handwritten there -- I assume we're looking at the same
4 thing.

5 THE COURT: I have that, yes.

6 MR. DURST: Yeah, Frito-Lay contends that
7 it has continually used the same Tostitos SCOOPS! chip
8 design, never ceased using it, and never intended not to
9 use it. That's the legal standard for abandonment.

10 THE COURT: I don't see why it's
11 necessary for these preliminary instructions. I mean, I
12 have indulged both sides in your request in your detail,
13 which I don't ever even give. And I just say these
14 claims using the defense, and I give no other
15 instructions typically other than generic preliminary
16 instructions.

17 Because of the nature of this case, I
18 allowed it. The fact that they inserted abandonment,
19 it's just an idea that they have a defense they've
20 asserted in a pretrial order. So that's the reason why
21 it's in there. I don't -- it's not necessary to include
22 every single instruction.

23 MR. DURST: I understand, Your Honor.

24 THE COURT: Okay.

25 MR. DURST: The -- I think the next most

1 important one, Your Honor, is that at the bottom of
2 Page 6, the description of the patent-in-suit, the
3 patent does not cover the -- the patent for the most
4 part, Your Honor, relates to the process for making a
5 bowl-shaped tortilla chip, in particular with the
6 dropping of Claim 16. We don't have a claim for a
7 bowl-shaped tortilla chip.

8 THE COURT: Do you agree with that one?

9 MR. HILL: (Nods head affirmatively.)

10 THE COURT: All right. So I will make
11 that change.

12 MR. DURST: Your Honor, just in terms of
13 prioritizing things, those are the most important ones.

14 THE COURT: You can cross out in
15 Paragraph 3, the issues and decide it. Was there an
16 issue in there? You wanted that whole section taken
17 out. I'm not sure why it should come out.

18 MR. DURST: Oh, because there -- the --
19 the proposed excise was on account of the sentence that
20 talks about there being two issues or questions being
21 asked to be resolve by the verdict returned in this
22 case. And that is -- I guess the Court has mentioned
23 too because you're in the patent section.

24 THE COURT: Yes. Probably a variation.
25 We made a change -- I mean, this is probably coming from

1 the patent -- normal preliminary instructions to the
2 fact that the claims and so.

3 MR. DURST: So perhaps just a simple
4 insertion about two issues -- two questions or issues
5 with respect to the patent-in-suit or something like
6 that might be better, since we have all the variety of
7 IP, Your Honor.

8 THE COURT: So what are you suggesting to
9 change there?

10 MR. DURST: After the word, two issues,
11 just insert with respect to the patent-in-suit or with
12 respect to the '344 patent. Probably with respect to
13 the '344 patent is better.

14 THE COURT: Do you have any problem with
15 that?

16 MR. HILL: No problem, Your Honor.

17 MR. DURST: Your Honor, also on Page 6 --
18 and I think this was really just -- if we're on the
19 record, this is really just an item for the record,
20 unless the Court wishes to indulge additional discussion
21 of it.

22 THE COURT: I am not trying to hamper
23 your ability to say anything you want to say or bring to
24 the Court's attention. I was just given practicalities
25 of our timing issues.

1 MR. DURST: I understand. I understand.

2 THE COURT: I never want to restrict the
3 attorney's ability to bring an issue to the Court and
4 address those.

5 MR. DURST: There is a reference, Your
6 Honor, to comparing the -- we believe that the -- as you
7 know from our pretrial conference, that a direct
8 comparison, side-by-side on the chips, is an improper
9 comparison under the law. And the reference to
10 comparison of the marks, I think, runs afoul, Your
11 Honor, of that -- of that legal proposition.

12 THE COURT: Okay. Point to me where
13 you're at, so I can make sure...

14 MR. HILL: Your Honor, we fully argued
15 this, and it was ruled on at the pretrial conference. I
16 don't know why we're arguing it again.

17 THE COURT: I'm not sure -- I was trying
18 to point to where he's even at.

19 MR. DURST: So we're at the bottom of 5,
20 Your Honor, and at top of 6. And I guess actually what
21 we should be -- I misstated that. I think what I should
22 be suggesting, Your Honor, is that we -- we would
23 encourage that -- that the -- that the instruction be --
24 that the requested instruction be clear that the
25 comparison is to be done in a manner that the consumers

1 encounter the chips, not which is -- there's not going
2 to be any testimony of that side-by-side comparison.
3 So this could be fixed by confusion can occur at any
4 point that consumers encounter a product in the manner
5 and should be assessed -- should be assessed according
6 to the manner that -- the manner that the consumers
7 encounter the process.

8 MR. HILL: Your Honor, those are two
9 separate issues. The issue that the Court has addressed
10 is the point in time, not the method of comparison. And
11 the final charge will give the jury fulsome instruction
12 on what they need to do. It's not necessary in a
13 preliminary statement, particularly when we're going to
14 lose probably half of our opening statements, if this
15 continues.

16 THE COURT: I don't think a change is
17 necessary for that preliminary instruction.

18 MR. DURST: Okay. Those are the issues,
19 Your Honor.

20 THE COURT: I think that's minimal typos
21 we will try to clean up. I assume Defendants don't have
22 any objection to some of those where they made those
23 minor changes, unfair competition, and --

24 MR. HILL: Unfair competition, that
25 addition, Your Honor, that they made for the list of

1 causes of action, we have no objection.

2 THE COURT: Okay. Then let me go ahead
3 and we will make these changes and --

4 MR. HILL: Your Honor, we have a couple
5 of other issues which are things under the --

6 THE COURT: I believe we'll make these
7 changes and --

8 MR. HILL: Your Honor, we have a couple
9 of other issues that are things under the limine
10 motions.

11 THE COURT: I'm going to let my lawyer
12 start doing those changes so that we can get started.

13 MR. HILL: We have a couple of issues on
14 limine-related things that we wanted to get clear before
15 we begin putting on evidence. It's evidence subject to
16 limines before we start the opening statements.

17 THE COURT: Okay.

18 MR. HILL: I'll start with a couple of
19 things. Number one, Your Honor, there is the issue in
20 the motion in limine regarding Dr. Okos and whether our
21 intention to cross-examine Dr. Okos with regard to the
22 trade secrets that he initially alleged to exist and
23 opined upon and then recanted in his deposition, we
24 would like to be able to use that information in opening
25 statement, because the trade secret claim was

1 highlighted during voir dire; that we've been called
2 thieves.

3 At this point, the jury is entitled to
4 hear the full presentation of the evidence, and we
5 believe it's important for us to highlight in our
6 presentation of what the evidence will show the fact
7 that the person that made the accusation against us then
8 recanted it in certain respects.

9 And we would ask that we -- we think that
10 issue is fairly before the jury now in light of what
11 went on in voir dire, and we would ask we be able to
12 present that in our opening statement.

13 We've provided specific page and line
14 designations of the two small clips we plan to use to
15 Plaintiff's counsel in advance, and so they're on
16 notice.

17 I don't know if you want me to move
18 through the list of issues, Your Honor, or just stop
19 there.

20 THE COURT: Sure.

21 MR. DURST: Your Honor, this issue is no
22 different than what it was when you addressed it on
23 Friday, and the place the Court wound up then was that
24 this goes to -- if anything, it goes to Mr. -- to
25 Dr. Okos' credibility, and that's not -- that's not an

1 issue in opening statements.

2 So what we would request, Your Honor, is
3 that to adopt the same approach you had on Friday, which
4 was if this becomes an issue with Dr. Okos' credibility
5 on what is a trade secret and what is a misappropriated
6 trade secret is properly before the jury, then this
7 issue could be addressed and -- we could approach, and
8 this issue could be addressed at the bench.

9 It is not -- it's not an issue yet, and
10 it won't be in opening statements. So the motion in
11 limine we suggest should stay in place.

12 MR. HILL: Your Honor, it's a issue of
13 Frito-Lay's credibility and not Dr. Okos.

14 MR. DURST: It is not, Your Honor, and
15 that goes exactly -- that runs exactly afoul of those
16 policy issues that we talked about on Friday. So they
17 want to -- I'm sorry if I'm talking over the Court.

18 THE COURT: No, that's fine.

19 I don't see a basis of changing my ruling
20 based on your use of it in opening statements. And I
21 told you at the pretrial conference that I do believe,
22 if you get into that on cross-examination of the
23 witness -- and we certainly can argue that later, but
24 for the purpose of opening statements, I don't think
25 it's necessary.

1 MR. HILL: I have three other quick
2 evidentiary issues, Your Honor. Specifically with
3 regard to Defendants' Exhibit 274, Defendants'
4 Exhibit 274 is a book. It is a corn spec. It is a corn
5 manufacturing processing book that we --

6 THE COURT: Y'all mentioned this at that
7 conference.

8 MR. HILL: We did. We put it on the
9 exhibit list. It's been probably two weeks ago now. It
10 was not -- we put it on when we got it and we got the
11 book -- the reason the book is relevant is Frito-Lay
12 will put a corn spec in front of the jury and say that
13 we misappropriated it.

14 And attached to that corn spec is a
15 table. We now know from searching through that it is
16 this table right here (indicating) out of this book. We
17 found the table. It is a table that was in production
18 that was given to us by Frito-Lay that they allege or --
19 excuse me -- was produced in this case. Frito-Lay
20 alleges it's a trade secret. They say it came from
21 them, which implies to us they should have had this book
22 and the book should have been produced in discovery.
23 We had to find the book on our own. We found it. We
24 think we ought to be able to show the jury the corn spec
25 and where it comes from, from a public source. It's the

1 truth. The jury is going to be told that that's a trade
2 secret. We've got definitive proof that it's from a
3 textbook, and they ought to be able to consider that.
4 And our finding it, when we did find it, it is what it
5 is. But we think they suffer no prejudice. They have
6 been on fair notice. That's out there. The trade
7 secret claims have been moving pretty rapidly of late in
8 any event, and we think this is a fair defense.

9 MR. DURST: Your Honor, Mr. Hill,
10 respectfully, has his facts wrong. That document came
11 out of their files, not Frito-Lay's files. And that's a
12 book that they examined three or four of our witnesses
13 also about, whether our witnesses knew the author.
14 So it's the book, Your Honor, that they want to put in
15 evidence that apparently they've had all along.

16 MR. HILL: He's got the wrong book, Your
17 Honor. He's thinking about the Rooney book.

18 MR. DURST: And, Your Honor, that table,
19 if it is the one I believe it is, is a USDA table. It
20 says right on it it's not part of our trade secrets
21 allegation.

22 So this was a late-produced document.
23 The page that he's concerned about actually came out of
24 their files, not ours. And it's not part of our trade
25 secrets allegations.

1 MR. HILL: It brings us to another issue,
2 Your Honor. It's Plaintiff's Exhibit 95. Plaintiff's
3 Exhibit 95 was put on the exhibit list. It is the corn
4 spec. It is a two-page document. It came out of
5 Medallion's files, and it was used with witnesses in
6 depositions as a two-page document, because that's what
7 it was in our files.

8 The night before last, Frito-Lay pulled
9 the back page off and produced just the first page. So
10 they got rid of the corn spec. They changed the
11 exhibit, the exhibit that's been used with deposition
12 witnesses in this case.

13 And that's what they're trying to say
14 now. It's not part of their allegation is because they
15 have altered Exhibit 95. That's another issue on our
16 list, is we want the complete Exhibit 95 in the record,
17 not the one Frito-Lay has manufactured at trial.

18 MR. DURST: Your Honor, there is no
19 testimony in the record -- those pages were produced
20 sequentially by Defendants and sent to us in an e-mail
21 from counsel. There's no testimony by any fact witness
22 anywhere in the case that those documents existed
23 together in Ralcorp or Medallion's files.

24 Instead we have a transmittal e-mail from
25 counsel when we asked for what -- when we asked for

1 information about the corn specs, and counsel sent those
2 to us in a -- in a cover e-mail. And there's no
3 testimony anywhere by fact witnesses that said these
4 appeared in the file together.

5 Your Honor, I question about why we're
6 arguing about this stuff in the opening statement or --

7 THE COURT: What's the other one right
8 now?

9 MR. HILL: Your Honor, if I can't
10 use Dr. Okos, I have to respond to their trade secret
11 allegation, and the way I plan to respond to their trade
12 secret allegations is to show what they claim as trade
13 secrets in many instances are publicly available
14 information in things like textbooks and other public
15 available sources.

16 If I can't push back because of Dr. Okos,
17 what he's now recanted, and I can't push back on what's
18 in the public domain, I just can't push back, Judge. I
19 have to sit silent on the trade secret allegation.

20 THE COURT: What's the objection to the
21 exhibit? I guess I'm not sure I understand --

22 MR. DURST: The objection --

23 THE COURT: -- what the objection was.

24 MR. DURST: The objection to the book?

25 THE COURT: Yes.

1 MR. DURST: The objection to the book,
2 Your Honor, is we believe that they've had it all along.
3 They produced it two weeks ago. We didn't have a chance
4 to examine any of their witnesses, including their trade
5 secrets expert on it.

6 THE COURT: Mr. Hill, this is not a
7 Defendants' exhibit. I mean, in their own files?

8 MR. HILL: This was not in the
9 Defendants' files, Your Honor, no. What this was it was
10 a book that we searched around and found in the public
11 domain. And it's from the Snack Food Association and
12 International Trade Association.

13 And we discovered, as we saw this trade
14 secret allegation, as we investigated their evolving
15 trade secret claims, that what they claimed as a trade
16 secret is something that's in a publicly available
17 textbook. And we think we ought to be able to respond
18 to the trade secret claim about that.

19 MR. DURST: Your Honor, there's no
20 allegation that --

21 THE COURT: What I'm going to do now,
22 they only discovered the document two weeks ago, but how
23 they questioned their witnesses about the documents --

24 MR. HILL: We did not. We didn't
25 question any witnesses about this document.

1 MR. DURST: The questions of our
2 witnesses was about a treatise, and you're telling me
3 that was a different -- that's not the book there?

4 MR. HILL: This is not. That was the
5 Rooney book, which is in evidence.

6 MR. DURST: Okay. So, Your Honor, the
7 document that was in their files is a Frito-Lay corn
8 specification document. The other document that counsel
9 gave us was a USDA table, which is what Mr. Hill has in
10 his hand.

11 There's no testimony by a fact witness in
12 the record that ties those two together. And so he
13 wants to now make that argument and use this
14 late-produced document to buttress it, and that's what
15 we're objecting to.

16 If he wants to make the argument and he's
17 got a fact witness that can say it appeared that way,
18 that's a whole different deal, but that's not what the
19 record is and that's not in opening statements.

20 MR. HILL: Your Honor, I can use it with
21 his witnesses. That's why I'm entitled to open on it.
22 It's fair evidence, and it's evidence he put in the
23 record and then changed two days ago.

24 THE COURT: Well, certainly I don't see a
25 problem with you trying to use that document for

1 cross-examination purposes on their witnesses. I'm
2 trying to figure out why is it necessary for opening
3 statements.

4 MR. HILL: Your Honor, if we can't
5 respond to the trade secret allegations to show that
6 they are in the public domain and we can't talk about
7 Dr. Okos, we have nothing we can talk about to push back
8 to show that these trade secret claims are not secrets.
9 And so this is our defense to trade secrets.

10 THE COURT: Mr. Hill, how -- this does
11 not come under a motion in limine. The issue is the
12 exhibit -- none of these things are actually admitted.
13 I don't admit them until afterwards, so you're welcome
14 to talk about what you think the evidence is going to
15 show and certainly you can use them to cross-examine
16 their witnesses.

17 So the evidence is coming in. Whether
18 the exhibit itself gets admitted, I don't know yet. I'm
19 not sure I understand what the problem is.

20 MR. HILL: Your Honor, what I want to be
21 able to do is show Exhibit 95, Plaintiff's Exhibit 95.

22 THE COURT: You want to be able to show
23 it?

24 MR. HILL: I want to show it to the jury
25 in opening statements, because it's what the evidence is

1 going to show. It's a Plaintiff's exhibit. I want to
2 show Plaintiff's Exhibit 95. I want to show them the
3 second page of it, and I want to tell them that document
4 comes from a public source, and we're going to prove it
5 to you.

6 MR. DURST: And, Your Honor, we would
7 object to that document. So the agreement between the
8 parties, I believe, and I thought the understanding of
9 the Court was that the evidence that would be discussed
10 that could be discussed in opening statement is that to
11 which there has been no objection.

12 And we have objected to that document
13 because of this factual circumstance, which is there
14 isn't a fact witness anywhere that puts those two
15 documents together.

16 MR. HILL: And that's why we're raising
17 it, Your Honor. I didn't just pop it up. I wanted to
18 raise it and get a ruling. And I can show you the -- I
19 can show you Exhibit 95. I can show you 274, which is
20 the book, if you'd case to examine these.

21 THE COURT: So, again, back to -- the
22 only -- the only objection you're making to the document
23 is it's late production?

24 MR. DURST: That's the objection we make
25 to the book, and we withdrew the two-page -- when we

1 figured out what had gone on with the fact witnesses,
2 Exhibit No. 95 that he wants to use, and we figured out
3 that the pages had come together by virtue of the way
4 the lawyers produced it and not supported by the facts,
5 we withdrew it and put them in as independent pages.
6 And so Exhibit 95, Your Honor, is a document from their
7 files that has a Frito-Lay logo on it of our corn
8 specifications.

9 MR. HILL: And, Your Honor, Exhibit 95
10 has been used as a two-page document with deposition
11 witnesses throughout this case. It's marked as an
12 exhibit, and it was on their exhibit list until they
13 figured out, because of the orders and what's been going
14 on with the trade secret claim, that we had a way to
15 push back against it. So they tried to strip out the
16 page that they know shows the incredulity of their
17 assertion of that trade secret.

18 MR. DURST: Your Honor, we withdrew that
19 exhibit. I will not use Exhibit 95. I won't use the
20 corn spec with the Frito-Lay exhibit.

21 MR. HILL: Your Honor, we have
22 cross-designated everything that's on their list, so it
23 is in play, and we want an opportunity to push back
24 against the claims being made against us. And this is a
25 fair confrontation of evidence they have put forward as

1 proof of a trade secret and it shows what we think the
2 jury ultimately will need to understand about the nature
3 of the claims being made against us.

4 MR. DURST: Your Honor, if he has a
5 witness that can come up and take the stand and tell the
6 jury under oath that those two pages are together in the
7 Ralcorp and Medallion files, this debate is completely
8 different. There is no foundation for that.

9 MR. HILL: Your Honor, it's an opening
10 statement. If I put it up and create a credibility gap
11 for myself and I can't get it in through a witness, he
12 can skewer me in a closing argument like nobody's
13 business. I am entitled to that much rope to try to
14 hang myself.

15 MR. DURST: That's why we objected to it,
16 Your Honor, because of the undue prejudice of him making
17 that suggestion as they did when they produced it to us
18 without facts to support it is the basis for our
19 objection.

20 THE COURT: Well, Mr. Hill, I will let
21 you -- I still haven't decided whether I am going to
22 admit the exhibit at this point, though I will let you
23 go ahead and use in it opening statements. If it
24 doesn't come in later, then we will deal with that and
25 they can make that argument later.

1 MR. HILL: Thank you, Your Honor.

2 MR. DURST: Which exhibit are you
3 allowing, Your Honor? The book?

4 THE COURT: I'm allowing them to use it
5 in opening statements. I'm not saying I'm going to
6 admit the exhibit.

7 MR. DURST: With respect to the book?

8 THE COURT: 274.

9 MR. HILL: The book is 274. And then
10 also, Your Honor, we want to show the two pages of
11 Exhibit 95 as it existed before it was altered two days
12 ago.

13 THE COURT: Is that a Plaintiff's
14 exhibit?

15 MR. DURST: No, Your Honor, we withdrew
16 that.

17 MR. HILL: It was their exhibit, Your
18 Honor. We didn't object to it until it changed night
19 before last.

20 THE COURT: Well, they withdrew the
21 exhibit, so...

22 MR. HILL: We cross-designated it, so
23 we're not turning it loose.

24 THE COURT: So they admitted it as an
25 exhibit as well, so --

1 MR. DURST: They did not, Your Honor.
2 It's on our exhibit list. They had the opportunity to
3 put it on their exhibit list. They did not withdraw it
4 if they put in some pro forma boilerplate somewhere that
5 they cross-designated, I --

6 THE COURT: Is it a listed exhibit?

7 MR. HILL: We cross-designated everything
8 that was on their list just as they did ours, as you do
9 in every case when you go to trial to avoid this very
10 problem when the other side realizes they've got
11 evidence you're going to use and they try to pull it out
12 from under you.

13 MR. DURST: It's not listed on their
14 list, Your Honor.

15 THE COURT: Again, I am not restricting
16 your ability to use it in opening statement in that
17 regard, because you're telling the jury you think this
18 is what the evidence is going to show. And I don't know
19 if it's going to come in or not, but we'll deal with
20 that later. We'll deal with the ramifications of that,
21 if it happens.

22 MR. HILL: Thank you, Your Honor.

23 There's one last issue I want clear, so
24 that I make sure I was clear about everything that might
25 be in the opening. And that's Defendants' Exhibit 171.

1 It is a Pepsi document in regard -- that has a
2 discussion of what they call low-cost SCOOPS!
3 The Court entered a limine order and asked us to
4 approach before that issue was used. Based on the
5 allegations in the case about that we are a lesser
6 quality during voir dire, we want to show that Pepsi
7 considered our process to be a favorable alternative to
8 their own.

9 MR. DURST: Your Honor, the record on
10 that hasn't changed at all, and there's nothing in the
11 record that suggests that those documents about what we
12 have under development is the same as the Defendants'
13 process. And there won't be, because it's just not
14 true.

15 So that limine motion, Your Honor, should
16 stand.

17 THE COURT: That's the part of the motion
18 in limine which is different from the other arguments
19 you're making outside the motion in limine I'm not
20 changing at this point.

21 MR. DURST: I have one, Your Honor.

22 MR. HILL: Thank you, Your Honor.

23 MR. DURST: And particularly given where
24 we just were, I beg the Court's indulgence on this,
25 because it is a limine motion.

1 THE COURT: It is not an issue of my
2 indulgence. Again, I'm not going to restrict you, but
3 we are dealing with a time issue. If we don't get
4 through, we can always go to the next day.

5 MR. DURST: Your Honor, in voir dire, you
6 heard what Mr. Hill did with us, and the fact that there
7 was an expiration date on the bag of chips that had
8 been, you know, purchased and developed along in the
9 case, and that the expiration date had passed.

10 He even got one of the jurors to say that
11 the juror thought that was an act of deception. The
12 Court will remember that, calling into account not only
13 Frito-Lay's credibility, Your Honor, but my personal
14 credibility.

15 We have a motion in limine in this case
16 that the Defendants filed, and I would ask the Court to
17 renew its consideration of it.

18 There is a company policy at Medallion
19 that allows expired products to be mixed back into the
20 products that are being produced. So they can take
21 expired products that have been sitting around on the
22 floor, pour it back in the production line, and it goes
23 out to consumers for consumption. That policy exists in
24 the Medallion plants.

25 It's older products that may not be --

1 I'm sorry. I said expired products. It's at least
2 older products, and there's testimony that this happened
3 with Mr. Vickery in nearly expired products, Your Honor.
4 But the notion that you take products that are near the
5 end of their life and you mix them back in there and you
6 produce -- and there's a policy in the plant --

7 THE COURT: Different vendors that they
8 make them for have different dates they require. So it
9 really wasn't on expired products per se. It was
10 only expired -- they are only expired probably as to
11 let's say, for example, Walmart, for one, versus Kroger
12 has a later date or something. So it's not like they
13 were out of date for what they normally would be, let's
14 say, the longest date for an expiration date --

15 MR. DURST: That's the Defendants
16 argument, Your Honor. Mr. Vickery was turned into his
17 superiors for violating this and taking chips that were
18 too old and pouring them back in. It's a policy in
19 their plant, quality of their product is at issue
20 because of dilution of our mark.

21 And particularly given what happened
22 with -- with the chips in voir dire, Your Honor, that
23 door should be opened. The jury is now left with the
24 impression that somehow that we've tried to mislead them
25 with respect to old chips, when in reality, the

1 Defendants in this case are using older chips and
2 selling them to consumers.

3 MR. HILL: Your Honor, Mr. Vickery didn't
4 put the chips in Mr. Durst's bowl. Mr. Durst put them
5 in there himself. He chose that.

6 THE COURT: Well, Mr. Durst, I don't
7 think that opens the door to that. I mean, the Court's
8 view is it was a simple mistake. Y'all can think about
9 that issue. I didn't think it was intentional on your
10 part. But I don't think it opens the door to that.
11 You are the one -- your side selected chips for the voir
12 dire, and they happened to be expired. I don't think it
13 was intentional, but --

14 MR. DURST: I understand.

15 THE COURT: And I don't know that --
16 Mr. Hill tried to even downplay it. He wasn't trying to
17 make a big deal of it. One juror made some comment.

18 MR. DURST: You're being too generous.
19 Do you remember his comment when he turned and looked at
20 me and said -- he looked at me and he said to the jury,
21 do you think that anything that happens in the courtroom
22 is not intentional?

23 Your Honor, this issue -- he has -- he's
24 demonstrated the force with this jury panel of the
25 notion that old chips -- the relationship between old

1 chips and current chips is a powerful issue, and these
2 people have that as a plant policy, selling goods that
3 have gone into the stream of commerce and being confused
4 with ours.

5 MR. HILL: Your Honor, this has nothing
6 to do with the issue that was raised in jury selection.

7 MR. DURST: If they didn't want expired
8 chips and old chips and that issue in the case, Mr. Hill
9 should not have opened that door in voir dire, Your
10 Honor.

11 THE COURT: I'm not saying that I won't
12 allow you to get in that area. I don't see it at this
13 point. I don't think that opens the door to the issue.
14 I really don't.

15 MR. DURST: We'll raise it at a later
16 point then, Your Honor.

17 THE COURT: I didn't think it is
18 imputing -- I didn't take it that way. Maybe I am being
19 too generous, but I didn't take it that way.

20 So anything else?

21 MR. HILL: We'd like to open, Your Honor.

22 THE COURT: Yes. How much time are you
23 planning on hoping to have?

24 MR. HILL: All that you will give us,
25 Your Honor.

1 MR. DURST: Indeed.

2 MR. HILL: I would -- the last thing I
3 want is the guy that's got to go second is to spill over
4 to tomorrow. So I would ask the Court to give us as
5 close to an hour a side as you can and turn us loose.

6 THE COURT: Let me ask you how important
7 is it to do the patent video? It's 15 minutes.

8 MR. HILL: We can skip it.

9 THE COURT: In this case, I'm not sure
10 it's that important. I only do that if both sides agree
11 to it.

12 MR. HILL: Or we could even play it
13 tomorrow, Your Honor, after the openings. No reason
14 they have to see it before.

15 THE COURT: That's true. I just
16 mentioned that. That's what I will do just to save
17 time.

18 MR. HILL: And, Your Honor -- if I could
19 ask one thing. I know it may be the Court's commitment.
20 If the jury blesses in advance of 10 minutes or 15
21 minutes so that we get a complete opening today, we
22 don't have to retread this ground.

23 THE COURT: I will take care of that.
24 Before I tell the jury you get each an hour, you're
25 going to stay within an hour each?

1 MR. HILL: I will stay within an hour,
2 Your Honor.

3 MR. DURST: I can stay within an hour,
4 Your Honor. That's not my preference, but I can do
5 that. I mean, the other option is opening tomorrow,
6 right? It's not very attractive of an option.

7 MR. HILL: No. We'd like to open today,
8 Your Honor, and we could certainly commit to an hour to
9 get it done.

10 THE COURT: Well, we will try -- by the
11 way, my rule on day one is not going beyond
12 5:00 o'clock, and I try to be mindful to the jurors,
13 because they have to drive, some quite a distance.

14 MR. HILL: The only thing we couldn't
15 accept, Your Honor, would be they get to open today, and
16 we would have to until tomorrow. We wouldn't want that.

17 THE COURT: I don't want that either.

18 MR. DURST: Your Honor, shall we do a
19 little bit of math here? So you're going to read the
20 preliminary instructions. Those are 15 pages long or 10
21 pages long?

22 THE COURT: I talk quickly, but these are
23 longer than my normal preliminary instructions, so --

24 MR. DURST: So that's 20 minutes
25 probably. Probably 20 minutes.

1 THE COURT: I don't want to get into the
2 case and be -- but I do think that -- here's the problem
3 we face, is that I want the jury's full attention in
4 this case, and I know that if we get to the 5:00 o'clock
5 hour, they are going to be antsy.

6 So what about me doing the preliminary
7 instructions with the video, and then just stopping for
8 the day and doing openings in the morning, knowing that
9 it may spill over into the -- I told y'all the two-week
10 period, but I do have time. I'm flexible with my
11 schedule.

12 And I just don't want to make any
13 shortcuts, and I agreed to allow Mr. Durst a little
14 extra time. I believe he wants between an hour and
15 75 minutes.

16 MR. DURST: I'm fine with that, Your
17 Honor.

18 THE COURT: Both sides okay with that?

19 MR. HILL: Your Honor, we will certainly
20 accept that too. My only other suggestion is we can
21 read all preliminary instructions after argument. We
22 argue today and they get all the charging in the
23 morning.

24 THE COURT: Well, now I have to give my
25 preliminary instructions before we begin the case.

1 That's sort of how I want to do it.

2 So -- okay. Are we ready?

3 MR. DURST: Yes, Your Honor.

4 THE COURT: Okay. Let's go ahead and
5 bring the jury in.

6 COURT SECURITY OFFICER: All rise for the
7 jury.

8 (Jury in.)

9 THE COURT: Please be seated.

10 Ladies and Gentlemen, I'm about to give
11 you my preliminary instructions. These are the
12 guidelines as we begin the trial. Sit back and enjoy
13 and please pay attention.

14 Ladies and Gentlemen of the Jury,
15 congratulations. You have now been sworn in as the jury
16 who will hear and decide this case. Your role as a jury
17 is to decide all disputed questions of fact, and it's my
18 role as the Judge to decide all questions of law and
19 procedure.

20 I will provide you with instructions on
21 the rules of law and procedure that you must follow in
22 making your decision.

23 I am now giving you some preliminary
24 instructions, and at the end of the trial, I will give
25 you more detailed final instructions on the law and

1 procedure that you must follow in reaching your verdict
2 in this case.

3 The party who brings a lawsuit is called
4 the Plaintiff. In this action, the Plaintiff is
5 Frito-Lay North America, Inc., who we will refer to as
6 either the Plaintiff or as Frito-Lay.

7 The party against whom the suit is
8 brought is called the Defendant. In this case, the
9 Defendants are Medallion Food, Inc., and Ralcorp
10 Holding, Inc., who will be collectively referred to as
11 Medallion.

12 This is a case with alleged patent
13 infringement, misappropriation of trade secrets, unfair
14 competition and trade dress infringement and dilution.

15 At this time, I will give you my
16 preliminary instructions, and then you will hear the
17 attorneys' opening statements.

18 An opening statement is an overview of
19 what each side expects the evidence to show -- I think I
20 misread that.

21 The opening statement is an overview of
22 what each attorney expects the evidence to show, but
23 what the attorneys say is not evidence. It is only
24 intended as a roadmap to help you understand the
25 evidence as you hear it during the course of the trial.

1 After opening statements, the Plaintiff
2 will present its evidence, and then the Defendants will
3 present their evidence, and finally, the Plaintiff will
4 present rebuttal evidence.

5 Once all the evidence is in, both sides
6 will present their closing argument after which I will
7 give you my final instructions, and finally, you'll
8 retire to the jury room to begin your deliberations to
9 reach your verdict at that time.

10 Now, during the course of the trial, you
11 should keep an open mind until you have heard: (1) all
12 the evidence; (2) the attorneys' closing arguments; and
13 (3) my final instructions called the Court's charge.

14 Be sure to pay close attention to all the
15 testimony and the evidence. To help you, you may take
16 notes during the trial if you wish. If you decide to
17 take notes, consider note-taking in evidence -- if you
18 decide to take notes, consider noted testimony and
19 evidence that you not only disagree with but also agree
20 with.

21 You do not have to take notes, but if you
22 do, do not get so involved in your note-taking that you
23 become distracted and miss part of the testimony. Your
24 notes are to be used only as aids to your memory, and if
25 your memory should later be different from your notes,

1 you should rely on your memory and not on your notes.
2 If you do not take notes, rely on your own independent
3 memory of the testimony. Do not be unduly influenced by
4 the notes of other jurors. A juror's notes are not
5 entitled to any greater weight than the recollection of
6 each juror concerning the testimony.

7 Until this trial is over, do not discuss
8 the case with anyone and do not permit anyone to discuss
9 this case in your presence. This includes your family,
10 friends, and even your fellow jurors.

11 The very first time you should ever
12 discuss this case is at the end of the case when you and
13 your fellow jurors retire to the jury room and actually
14 begin deliberating on your verdict.

15 If anyone should attempt to discuss the
16 case or approach you concerning the case, you should
17 inform me through my court staff immediately.

18 Now, during the trial, you should hold
19 yourself completely apart from the people involved in
20 the case: The parties, the witnesses, the attorneys,
21 and the persons associated with them.

22 It is important that you not only be fair
23 and impartial but also that you appear to be fair and
24 impartial. That is why you should not have contact with
25 any of them.

1 Also, you may not communicate
2 electronically with anyone about the case. You may not
3 communicate with anyone about the case on your cell
4 phone, through e-mail, BlackBerry, iPhone, text
5 messaging or on Twitter, through any blog or website,
6 including Facebook, Google, MySpace, LinkedIn, or
7 YouTube.

8 You may not use any similar technology
9 even if I have not specifically mentioned it here.
10 I expect you will inform me as soon as you become aware
11 of another juror's violation of these instructions.

12 Now, you should not make any independent
13 investigation of any fact in this case. Do not learn
14 anything about the case from any other outside source.
15 Do not watch TV or read the newspaper about the case.
16 Do not use any kind of Internet search engine, such as
17 Google, to find out more information about the case, the
18 parties, or the attorneys in the case.

19 For example, if you have a home computer,
20 during this case, do not go home and get on your home
21 computer and start trying to figure things out.

22 In other words, you should not consult
23 dictionaries or reference materials, search the
24 Internet, website, blogs, or any other electronic tools
25 to obtain information about this case or to help you

1 decide the case. You are to be guided only by the
2 evidence in this case, only by what you see and hear in
3 the courtroom, not by anything else.

4 Now, during the trial, it may be
5 necessary for me to confer with the lawyers outside your
6 presence or to conduct a part of the trial outside of
7 your presence. I will handle these matters as quickly
8 and conveniently for you as I can, but you should
9 remember they are a necessary part of the trial.

10 Now, this is a case with claims for
11 patent infringement, trade dress infringement and
12 dilution, and misappropriation of trade secrets and
13 unfair competition.

14 I will now summarize each side's
15 contentions and the general legal principles that apply
16 in this case. At the end of the trial, I will give you
17 more detailed instructions regarding the law that you
18 must follow in deciding the issues that are presented to
19 you.

20 There are three types of intellectual
21 property at issue in this case: Trade secrets, trade
22 dress, and patents.

23 Trade secrets and unfair competition.

24 Frito-Lay contends that Medallion
25 competed unfairly by misappropriating the value of the

1 time, skill, and labor Frito-Lay spent in developing
2 their Tostitos SCOOPS! tortilla chips.

3 Frito-Lay also contends that Medallion
4 misappropriated Frito-Lay's trade secrets.

5 Medallion denies that the information at
6 issue is a trade secret, denies that they
7 misappropriated any trade secrets from Frito-Lay, and
8 denies that they competed unfairly.

9 Now, unfair competition is the
10 appropriation and use by a defendant in competition with
11 a plaintiff of monetary and financial or property
12 interest created by a plaintiff through the expenditure
13 of time, labor, skill, or money.

14 A trade secret is any formula, pattern,
15 or device, business or marketing plan, customer list or
16 other information used in a business which gives the
17 owner an opportunity to obtain an advantage over
18 competitors who do not know or use it.

19 Information that teaches what not to do
20 or what not to try may be a trade secret.

21 Now, misappropriation of trade secrets
22 requires that:

23 1. The trade secret existed;

24 2. That Medallion breached a

25 confidential relationship or obtained the trade secret

1 | through improper means;

2 3. That Medallion used the trade secret
3 without authorization from Frito-Lay;

And then 4. Frito-Lay suffered harm as a
direct and proximate cause of such use.

6 I will give you more detailed
7 instructions to assist you in deciding whether something
8 is a trade secret at the end of the trial in my final
9 charge.

10 Trade dress.

11 Frito-Lay also asserts that Medallion
12 infringed and diluted Frito-Lay's trade dress rights in
13 the Tostitos SCOOPS! chip design and the Tostitos
14 SCOOPS! packaging.

15 Medallion denies any alleged trade dress
16 infringement. They also contend that Tostitos SCOOPS!
17 chip design is not protectable trade dress because it is
18 functional. The Defendants also contend that Frito-Lay
19 has abandoned its trade dress rights in the Tostitos
20 SCOOPS! chip design.

Now, trade dress refers to the design or configuration of a product and/or packaging of a product that a company uses to identify and distinguish its products from products manufactured or sold by others.

25 The first company to use trade dress and

1 distinguish its product in the marketplace can acquire
2 the exclusive right to use that trade dress and the
3 right to exclude others from using it. Ownership of
4 trade dress rights is established through use.

5 A trade dress owner can exclude others
6 from using its trade dress or a similar trade dress that
7 is likely to cause confusion, mistake, or deception as
8 to the source or sponsorship of the accused party's
9 products or likely to dilute the distinctiveness of the
10 owner's trade dress.

11 The likelihood of confusion can be shown
12 by a similarity between the trade dress, the products,
13 and the places they are stored or marketed, any intent
14 to copy the Plaintiff's trade dress and any actual
15 confusion or evidence of confusion presented through
16 consumer surveys.

17 However, proof that an actual confusion
18 occurs is not required. Confusion can occur at any
19 point the consumers encounter a product before buying
20 it, at the moment of purchase, or after buying it.

21 Trade dress that is functional under the
22 law is not protectable. The determination of whether
23 something is functional is made by considering the trade
24 dress as a whole.

25 Trade dress is considered functional if

1 (1) it is essential to the use or purpose of an article
2 or affects the cost or quality of the article, or (2) it
3 is a feature exclusive -- it is a feature of the
4 exclusive use, which would put competitors at a
5 significant non-reputation-related disadvantage.

6 Abandonment is a defense against trade
7 dress infringement. Abandonment requires proof that the
8 trade dress owner ceased using the trade dress and
9 intended not to resume using it.

10 Patents.

11 Frito-Lay also contends that Medallion
12 willfully infringed one of Frito-Lay's patents.

13 Frito-Lay contends that Medallion used a
14 manufacturing process that infringes Claims 1, 5, 6, 7,
15 8, and 12 of the patent. Medallion contends they have
16 not infringed the patent willfully or otherwise.

17 Now, generally, there are two questions
18 you may be called upon to answer at the end of the case
19 regarding this patent claim:

20 (1) Is there infringement?

21 And (2), if so, what are the damages?

22 Now, there's one patent involved in this
23 case, which you've heard it already referred to as
24 6,610,344, but the patents are usually referred to as
25 the last three digits, which you've heard the attorneys

1 mention. So it will be referred to throughout the trial
2 as the '344 patent.

3 The patent-in-suit generally relates to
4 the process for making shaped tortilla chips. You'll
5 hear more about the invention during the opening
6 statements.

7 I'm now going to play a short video for
8 you. This video provides information as an introduction
9 to the patent system.

10 (Patent video playing.)

11 THE COURT: Now, you just saw the video
12 that provided a good overview of the U.S. patent system
13 and how it works. The video also showed a sample
14 patent.

15 Now, during the course of the trial or at
16 the end of the trial, you will have the opportunity to
17 look at the patent at issue in this case. You'll
18 actually have a chance to look at it and see it.

19 The cover page of the '344 patent
20 provides identifying information, including the date the
21 patent was issued and the patent number along the top,
22 as well as the inventors' names, the filing date, the
23 assignee, and the list of prior art publications
24 considered by the Patent Office when deciding to issue
25 the patent.

1 Then you will see the abstract, which,
2 again, is a brief statement about the subject matter of
3 the invention. On the next several pages, you'll see
4 drawings, which are -- in this patent, the '344 patent,
5 appear as Figures 1 through 12.

6 The drawings include various aspects or
7 features of the invention, and they are described in the
8 words later in the patent.

9 The written description of the invention
10 would appear next. In the portion -- in this portion of
11 the patent, each page is divided into two columns, which
12 are numbered at the top. The lines on each page are
13 also numbered going down the middle column.

14 When you see a reference during the trial
15 to a column and a line number, you can go to that part
16 of the patent to locate it. The written description of
17 the '344 patent begins with Column 1, Line 1, and
18 continues to Column 8, Line 54.

19 It includes a background section, a
20 summary of the invention, and a detailed description of
21 the invention, including some specific examples.
22 The patent ends with numbers -- numbered paragraphs,
23 which are called claims. The claims may be divided into
24 a number of parts referred to as claim limitations.

25 In the '344 patent, the claims begin at

1 Column 8, Line 5, and continue to the end of the patent
2 at Column 10, Line 52.

3 Now, the claims of a patent are the main
4 focus of a patent case, because the claims are what
5 define the patent owner's rights under the law. That
6 is, the claims define what the patent owner may exclude
7 others from doing during the term of the patent.

8 The claims of a patent serve two
9 purposes. First they set out the boundaries of the
10 invention covered by the patent. And second, they
11 provide notice to the public of those boundaries.

12 The claims of a patent are what are --
13 are what are infringed when patent infringement occurs
14 because the claims define what the patent is.

15 Thus, when a product or method is accused
16 of infringing a patent, the patent claims are compared
17 to the accused product or method to determine whether
18 there is infringement. In reaching your determination
19 with respect to infringement, you must consider each
20 claim separately.

21 Now, patent claims may exist in two
22 forms: Independent and dependent claims. In the '344
23 patent, Claim 1 is what is called an independent claim.

24 An independent claim does not refer to
25 any other claim of the patent.

1 Thus, it is not necessary to look to any
2 other claim to determine what Claim 1 covers. Claim 1
3 starts at Column 8, Line 55, and ends at Column 9,
4 Line 2.

5 Now, Frito-Lay's system or process for
6 making Tostitos SCOOPS! is not relevant to whether
7 Medallion's manufacturing process infringe Frito-Lay's
8 '344 patent.

9 Therefore, you are directed not to
10 consider the actual system and process used by Frito-Lay
11 in determining whether Medallion's manufacturing process
12 infringes any claim of the '344 patent.

13 The correct comparison for the purpose of
14 patent infringement is to look at the asserted claims of
15 the '344 and Medallion's manufacturing process.

16 Now, when the claims define the
17 invention, sometimes there's a disagreement between the
18 parties as to what certain words in the claims mean.
19 When this happens, they ask the Court to interpret those
20 terms in light of the patent as a whole. This is to
21 help resolve their disagreement and to give you, the
22 jury, guidance in applying the claims to the facts of
23 the case.

24 Now, this has happened in this case, and
25 sometime prior to trial, we had a hearing, I heard

1 arguments, and then rendered a claim interpretation of
2 the disputed terms.

3 The claim construction of those terms
4 will be set forth in the Court's charge that will be
5 given to you at the end of the trial. You must use
6 these meanings when you decide the issues of
7 infringement in this case.

8 Now, as I mentioned earlier, there are
9 really two questions at issue with respect to the '344
10 patent that you will be asked to resolve by the verdict
11 you return in this case. Those issues related to the
12 '344 patent are infringement and damages, and Frito-Lay
13 has the burden of proof on issues of infringement and
14 damages.

15 Also at issue in this case are claims for
16 trade dress infringement and dilution and
17 misappropriation of trade secrets and unfair
18 competition.

19 There are two different burdens of proof
20 that you must consider when deciding these issues. I
21 will give you more instructions in my final instructions
22 regarding which burden of proof applies to which claim.

23 Now, in any legal action, facts must be
24 proved by what -- as a -- start over again.

25 In any legal action, facts must be proved

1 by a required standard of evidence known as the burden
2 of proof. You must -- you have probably heard of the
3 beyond-a-reasonable-doubt burden of proof that's
4 required in criminal cases. This is the very highest
5 burden of proof that is not involved in this case.

6 There are two different burdens of proof
7 that are involved in this case. The first one is what
8 is called preponderance of the evidence, and the second
9 is called clear and convincing.

10 Now, the preponderance-of-the-evidence
11 burden of proof means that you must be persuaded that
12 what the party seeks to prove is more probably true than
13 not true.

14 Put it another way. If you were to put
15 the evidence for and against the party who must prove
16 the fact on opposite sides of a scale, the
17 preponderance-of-the-evidence standard requires the
18 scale to tip at least somewhat toward the party who has
19 the burden of proof.

20 The clear-and-convincing burden of proof
21 means that the evidence must produce in your minds a
22 firm belief or conviction as to the matters sought to be
23 established.

24 In other words, if you were to put the
25 evidence for and against a party who must prove a fact

1 on opposite sides of a scale, the clear and convincing
2 evidence requires that the scales tip more heavily
3 toward the party who has the burden of proof.

4 Now, normally, during the trial of a
5 case, only the lawyers for the parties ask questions of
6 the witnesses. In this case, I'm going to do something
7 different. I'm going to permit the jurors to also ask
8 questions of the witnesses.

9 Now, this is the first time I've used
10 this procedure during a trial, so you are my guinea pigs
11 on this procedure. It is my hope that this procedure
12 will be helpful to you. So we are going to do it in
13 this case, and I want to explain though how it's going
14 to work.

15 After the attorneys are through
16 questioning each witness, each of you will have the
17 option of submitting written questions for the witness.
18 I will give you these jury questionnaire forms --
19 they'll be blank -- that will allow you to fill in your
20 questions.

21 If during a particular witness's
22 testimony, you believe that there is something important
23 that you would like to ask the witness, you may write
24 your question in the form, enter the name of the
25 witness.

1 After the attorneys have completed their
2 questioning of the witness, I will then ask each juror
3 to pass their form to the court security officer. You
4 should pass a form even if it is blank. By doing this,
5 the identity of the juror asking the question would not
6 be readily apparent. There's also no need to put your
7 name on the form.

8 The Court will then take a short recess
9 to consider your questions for the witness. During the
10 recess, the Court will review the questions with the
11 attorneys. The Court will then decide whether it
12 believes the question is appropriate.

13 And I'll make that ultimate decision, so
14 please do not be offended if I don't ask any questions
15 you submit to the Court or if I rephrase it. It has
16 nothing to do with the attorneys; it's me deciding
17 whether or not that's an appropriate question or not.

18 After you return from the recess, the
19 Court will then ask the witness the questions it
20 believes are appropriate, and the witness will then
21 answer the questions to the jury.

22 After the witness answers all the jurors'
23 questions, the Court will allow the attorneys, if they
24 desire, to ask any follow-up questions.

25 It is my hope that allowing you to ask

1 questions will be -- allow you to be more engaged in the
2 proceedings and get the information you need to reach a
3 just verdict.

4 My one concern about the procedure is
5 that it not become too time-consuming. Please do not
6 feel compelled to ask questions even if you -- if you do
7 not feel it necessary.

8 At the same time you should not be afraid
9 to ask a question if you believe it will help you better
10 understand the witness' testimony. Your questions
11 should be limited strictly to the witness' testimony,
12 and you should not ask questions that are unrelated to
13 the specific testimony of that witness.

14 Again, the Court will decide whether your
15 question is appropriate and whether it should be asked.
16 You should not draw any adverse inference against any
17 party should the Court decline to ask a question or if I
18 rephrase a question that you have submitted.

19 Now, this just about concludes my
20 preliminary instructions.

21 Now, you have two duties as jurors. Your
22 first duty is to decide the facts from the evidence in
23 the case. Your second duty is to apply the law that I
24 give to you to the facts.

25 Perform these duties fairly and

1 impartially. Do not allow sympathy, prejudice, fear, or
2 public opinion to influence you.

3 Do not be concerned if you feel a little
4 lost at this point. I will give you -- I'll be giving
5 you much more detailed final written instructions at the
6 end of the case, and you will have all these
7 instructions -- that you will have all these
8 instructions in much greater detail accompanied by the
9 verdict form that we will ask you the questions that
10 will go to these claims and defenses.

11 You will also have the opportunity to
12 have those final instructions with you as I read them to
13 you at the end of the case.

14 By the time you get the verdict in this
15 case, you will have a better understanding and
16 confidence in answering those questions as we complete
17 all the evidence.

18 Also, let me assure you, you do not have
19 to be an expert on the law to be applied to this field
20 of the invention. We have very fine attorneys on both
21 sides, and they will do a good job of simplifying and
22 explaining all this to you, and they will also call very
23 capable experts who will help you understand the issues
24 and facts of this case.

25 By the end of the case, with the

1 assistance of the testimony and the evidence in the case
2 and the Court's charge, it is my hope that you will feel
3 very comfortable in deciding the issues in this case.

4 Now, let me just ask the parties, are you
5 planning on invoking the Rule?

6 MR. HILL: Yes, Your Honor.

7 THE COURT: So do we have witnesses here
8 that would not be excused from the Rule that are in the
9 courtroom?

10 MR. HILL: I don't believe we do at this
11 point, Your Honor.

12 THE COURT: Okay. That's fine.

13 Now, Ladies and Gentlemen of the Jury, at
14 this time, we would typically go into the opening
15 statements.

16 However, because of the long nature of
17 the day and because of -- I run a kind of strict
18 timeline. We run a schedule from 9:00 to 5:00. That's
19 our schedule each day, and I do my best to make sure we
20 are completed by 5:00 o'clock every day.

21 I know that everyone has a drive to make,
22 and the closest juror is about 30 minutes away, and
23 everyone else is even further. So we'll run that kind
24 of schedule.

25 There's no way to get the opening

1 statements done before 5:00 o'clock, before the end of
2 the day, so I'm going to release you a little bit early
3 today, and then we'll have opening statements in the
4 morning.

5 Now, the same instructions I gave you in
6 the preliminary instructions, I'm going to repeat again,
7 and you'll hear this at every break. I know this case
8 is interesting to you, and I think you're going to be
9 very engaged in the case, but you cannot go and discuss
10 this case with anybody else.

11 You can't go do any research, and you
12 will not discuss this case with anybody until you are
13 instructed by me at the end of the case to discuss it
14 with -- when you go to -- with the other jurors when you
15 go to retire.

16 I know and understand that you're going
17 to want to talk to your family about it, but you cannot
18 do that at this time. Once the case is over, you will
19 have that opportunity to do so. But until then, you
20 cannot do that.

21 And so it's something that's -- I'll be a
22 broken record. I'll be repeating that instruction
23 constantly.

24 Now, tomorrow we are going to start again
25 at 9:00 o'clock. And just for your pleasure, tomorrow

1 is a holiday in my book. It's called Fat Tuesday, and
2 my chambers will have certain sweets, and I'll make sure
3 you have some cookies tomorrow in celebration, so you
4 can share it, and my staff will also be sharing those
5 tomorrow.

6 So I'll be sugaring you up in the
7 morning, so you'll really be paying attention tomorrow
8 at 9:00 when we start opening statement.

9 So on that, you'll have your notepads,
10 and then your -- you can have those again -- please
11 bring those in tomorrow whenever we come back in, so you
12 can take notes if you desire to do so.

13 I'm now going to excuse you at this time,
14 and we'll see you -- if you'll be back here just before
15 9:00 o'clock, we'll do our best to start at 9:00 o'clock
16 in the morning.

17 So thank you.

18 COURT SECURITY OFFICER: All rise.

19 (Jury out.)

20 THE COURT: Please be seated.

21 Anything else? Do we know where we're
22 going?

23 MR. DURST: Yes, Your Honor. There are
24 some things -- let me get to the mic.

25 There may be some things, Your Honor, if

1 the Court's schedule permits, that we could bang out now
2 that would save us some time as we move forward over the
3 next couple of days.

4 THE COURT: Of course.

5 MR. DURST: Got a number of items. Let
6 me start with, Your Honor, the unobjected-to exhibits.
7 We have a list of the exhibits on our side of the case,
8 the Plaintiff's exhibits that are unobjected to.
9 And I see here that our Exhibit 95 is on there, so I
10 guess y'all didn't object to that, it sounds like.
11 But other than that, Your Honor, we have a list of the
12 exhibits for which, after an extensive back-and-forth
13 process, we've either resolved all the objections or the
14 objections were not made in the first place.

15 So how would the Court like to do that?
16 Can I offer it to the Court? Surely, we don't need to
17 read the numbers. I'd be happy to --

18 THE COURT: No, we don't need to read the
19 numbers. What you can do is, is that you can tender
20 that to Ms. McCord now, if you'd like, and what I will
21 do is, after closing arguments -- or after opening
22 statements have finished, that's the first thing I will
23 do, is I will inform the jury, before we call the first
24 witness, whenever that happens, tell them that all
25 exhibits that -- by both sides, which were unobjected to

1 or -- will be admitted into evidence at that time.

2 MR. DURST: All right, Your Honor. Then
3 I will hand up two copies of this.

4 THE COURT: That will be great. Thank
5 you.

6 MR. HILL: Your Honor, with regard to the
7 copies he's handing up, I don't think we've had a chance
8 to review those. We'd like to review it, of course,
9 before they're moved in formally in the morning.
10 We will have a list in the morning as well. And we
11 understand -- I guess it's the Court's intention to move
12 these in on the record, because that's when we need to
13 do it, is on the record in front of the jury to actually
14 move them in.

15 THE COURT: Well, it's not necessary in
16 that sense. What I would do is, he's submitted all the
17 exhibits that they're offering, that have not been
18 objected to. And so I would just make a general
19 statement that those are being admitted into evidence at
20 this time.

21 MR. HILL: Okay. All right.

22 THE COURT: I'll do that in front of the
23 jury.

24 MR. HILL: Okay.

25 THE COURT: So you can give the same

1 list -- I mean, there should be no issue here because
2 these are unobjected-to exhibits. They were on your
3 exhibit list. Of course, I want you to review it and
4 make sure --

5 MR. HILL: That's -- we just want a
6 chance to verify that, Your Honor.

7 THE COURT: I know. Make sure there's
8 nothing slipped in. I'm sure that's not been the case.

9 MR. HILL: Well, there's been some
10 movement of late, so we want to make sure of what we've
11 got.

12 THE COURT: I understand. So you can
13 look at those, but that's the plan unless you tell me
14 something different, if there's a problem --

15 MR. HILL: Okay.

16 THE COURT: -- that's what I would do
17 after opening statements. And I assume we'll need a
18 break after both opening statements, and then I'll do it
19 right after that before we call -- before Plaintiff
20 calls their first witness.

21 MR. HILL: Thank you, Your Honor.

22 THE COURT: What's next?

23 MR. DURST: Next, Your Honor, we have an
24 objection to a demonstrative that they have proposed to
25 use in opening statement that we lodged at the time they

1 were exchanged last evening, and our suggestion would be
2 that we take that up now.

3 So that objection, Your Honor, is -- they
4 certainly have their opening -- their --

5 MR. HILL: We do. I can switch over, and
6 we can put it up. It's the claim constructions, Your
7 Honor. We made a chart.

8 Can you put it up the construction chart?
9 There we go.

10 MR. DURST: The objection to this, Your
11 Honor, is with respect to the second item: To form
12 essentially even ranks. The -- I'm sorry. The third
13 item -- sorry -- alignment belt: A belt on which uneven
14 rows of pieces are adjusted.

15 The Court will recall that you added into
16 that construction that there is not a requirement that
17 the rows be uneven.

18 And so our objection is that that
19 construction of that term should include that limitation
20 that the Court put on it.

21 MR. HILL: Your Honor, we were just
22 unsure about it. The Court had put that in
23 parentheticals, and it said note, and then it had this
24 other statement. We didn't know whether that was
25 formally a part of the claim construction you would want

1 in front of the jury or not a part, so...

2 THE COURT: I'll have to go back. I
3 don't have that in front of me. It's on my desk, my
4 claim construction order.

5 MR. HILL: We're happy to do it either
6 way. We just -- we thought that was the complete
7 construction, and that was just an advisory note. We
8 didn't put the extra language in.

9 THE COURT: When we adjourn, I'll go back
10 and look at it, so I can get -- I can't tell you in the
11 abstract here, because I didn't look at that again,
12 so -- but whatever my claim construction is, that's the
13 only objection is using this -- you're saying it doesn't
14 match up to what I did, my claim construction.

15 MR. DURST: Right. And it's really just
16 that specific language on the alignment belt and the
17 Court's -- the Court's -- about not requiring uneven
18 rows.

19 THE COURT: If you'll stay here, I'll
20 check that. I just want it to be the same, whatever I
21 ordered. I'll go back and --

22 MR. HILL: We're checking. Judge, I've
23 got the order here, a copy of it, if you'd like.

24 THE COURT: That's fine.

25 MR. HILL: That helps.

1 THE COURT: Do you remember what term?

2 MR. HILL: It was for alignment belt.

3 THE COURT: I know, but --

4 MR. HILL: Off the top of my head, I do
5 not, Your Honor. I apologize.

6 (Pause.)

7 THE COURT: I see what you're saying.

8 The way the Court -- the Court construed that as a belt
9 on which uneven rows and pieces are adjusted into
10 essentially even rows. That's the construction.

11 But then I kind of -- I don't know what you want to call
12 it. I added another little statement saying, but the
13 Court also notes this construction does not require the
14 presence of an uneven row limitation to be met, so...

15 MR. HILL: Your Honor, we viewed that as
16 an indication to the parties of what was still available
17 in an infringement/non-infringement argument, not a
18 portion of the claim construction.

19 THE COURT: I agree. I agree. It's not
20 part of the claim construction term. So that's not the
21 Court's intent, to put that -- that's not part of the --
22 that's not the actual way to define the term.

23 MR. DURST: Your Honor, it's a little
24 more than just an infringement argument. It is -- it is
25 a -- and this is going to be up in front of the jury,

1 and we all know the esteem that the Court will be
2 held -- in which the jury will hold the Court.

3 And this is going to be Mr. Hill telling
4 the jury that this is what Your Honor said about these
5 terms. And one piece of the meaning of alignment belt
6 is that it does not require uneven rows.

7 So it's more than just -- a
8 non-infringement argument would be them saying that
9 they -- they don't have uneven rows. But this proviso
10 that the Court put in there is part of the order that
11 the Court gave with respect to what these terms mean.

12 THE COURT: Right. I understand that.
13 I'm just saying, what's the best way to --

14 MR. DURST: I'm fine if they put it in
15 parenthesis, like Mr. Hill suggested. I --

16 MR. HILL: Your Honor, we see that as
17 instructing the jury on the claim construction with
18 something that's not a portion of the Court's
19 construction. We think it tells Mr. Durst what he can
20 certainly present as an infringement theory still, and
21 we couldn't claim that he's arguing against the claim
22 construction based on that.

23 But that's the construction. So that's
24 what ought to be in front of the jury when they get
25 their charge at the end of the case, and it's what we

1 were going to put in front of them to argue the claim
2 construction issues as we go.

3 THE COURT: All right. I agree. I just
4 don't see that as -- I don't see that as part of -- the
5 claim construction is what's involved.

6 So, now, we'll see if it's something we
7 actually need to add in the Court's charge or something
8 to make sure, if it becomes an issue, but -- so I guess
9 the objection's overruled.

10 MR. HILL: Thank you, Your Honor.

11 MR. DURST: So you're overruling the
12 objection on that, Your Honor?

13 THE COURT: Yes.

14 MR. DURST: I want to make that clear for
15 the record.

16 THE COURT: I did.

17 MR. DURST: Okay. Okay. So we are not
18 prohibited from putting up, obviously, what the Court
19 actually wrote, including that proviso, I suppose.

20 THE COURT: Of course. I'm not
21 preventing you from doing that either, so...

22 MR. DURST: Just a housekeeping matter,
23 Your Honor, one more. In the Court's Motion in Limine
24 rulings, most of those were made mutual, and there was
25 one, I think, that the Court intended to be mutual, but

1 as it was modified, that language was not included in
2 the ruling.

3 This is the Court's ruling on Defendant's
4 Motion in Limine No. 8, which is the net worth salary or
5 compensation of the Medallion and Ralcorp employees, and
6 the Court will recall we had a little dialogue about Mr.
7 Vickery and Mr. -- and Ms. Price.

8 And the Court will permit us to present
9 evidence on those two, but as to all other employees,
10 both their employees and our employees, our
11 understanding was that this was mutual. I think that
12 was the intent.

13 MR. HILL: We have no intention to bring
14 up their employee compensation, Your Honor.

15 THE COURT: I think that's -- sorry about
16 that. That's my mistake.

17 So everyone is clear that was -- it was
18 meant as mutual.

19 MR. DURST: All right. And under the
20 last item I have for today is just a housekeeping item
21 with respect to how the Court wants to handle certain
22 objections.

23 The Court has overruled some items with
24 respect to motions in limine to which I would like to
25 have an objection in the record. Would the Court like

1 to -- perhaps the most efficient way is for that to
2 happen this afternoon on the record, is just a handful
3 of items that relate to the motions in limine.
4 The Court has already ruled on them. I don't intend to
5 reargue these, but I think we need something in the
6 record -- the trial record that shows we objected to a
7 handful -- a half dozen or so particular items that I
8 expect to be in opening statement tomorrow.

9 THE COURT: Okay. That's fine.

10 MR. DURST: One is reliance on advice of
11 counsel. We stated the basis for that objection in our
12 motion in limine, Your Honor, both the Wheelock opinion
13 and the Adkins opinion.

14 THE COURT: So these are the objections
15 you're anticipating on what his opening statement is
16 going to be?

17 MR. HILL: I think he's -- that's what it
18 sounds like, Your Honor.

19 THE COURT: I mean, I'll give you a
20 chance to make a record. If you don't want to stand up
21 in opening statement and make an objection, that's fine.
22 I'll let you make a record after we're done with opening
23 statements.

24 Is that what you're trying to do now
25 or --

1 MR. DURST: Yes. And I just thought it
2 would be more efficient to do it now. It will go quick.
3 I think it's only a half a dozen or so. As I said, I'm
4 not trying to reurge, but if the Court would rather us
5 do it after opening, I just thought we had a little bit
6 of time to --

7 THE COURT: No. I mean, I'll let you do
8 it now, but we haven't heard opening statements, so --
9 go ahead.

10 MR. DURST: Well, it's not just with
11 respect to opening statements, Your Honor. I mean, I --
12 if I could, I'd like to have a running objection on this
13 reliance on advice of counsel because --

14 THE COURT: Oh, I don't do running
15 objections, so --

16 MR. DURST: Okay. Well --

17 MR. HILL: Your Honor, trial objections
18 are a part of the trial, and when we offer evidence that
19 he has an objection to, he ought to object, as will we
20 to make our record.

21 THE COURT: No. I agree. I mean, I
22 don't do it that way. That's -- because a motion in
23 limine is just a motion in limine. It's not to prevent
24 any error whatsoever, so...

25 MR. DURST: Well, Your Honor, we object

1 to any presentation in opening statement or suggestion
2 that the Defendants relied on advice of counsel on the
3 basis that we stated in the prior briefing to the Court.

4 THE COURT: That's fine. I mean, I want
5 to be consistent when I overrule that -- I overrule the
6 objection, if they're going to make any reference to
7 that. That's fine.

8 MR. DURST: Same with respect to patent
9 application, Your Honor, the Defendant's patent
10 application. We object to presentation of evidence with
11 respect to Defendants' application to the jury.

12 THE COURT: Assuming he makes that, then
13 I'll overrule that objection, just as I did the motion
14 in limine.

15 MR. DURST: And, Your Honor, we heard a
16 little bit of this, I think --

17 THE COURT: And, Mr. Durst, maybe things
18 will change when the evidence -- as the evidence goes
19 on, but for the purposes of opening statement, that's
20 the case.

21 MR. DURST: I appreciate the courtesy,
22 Your Honor. I don't really want to interrupt
23 Mr. Hill's -- or whoever is going to be doing it --
24 opening statement tomorrow. So I just kind of wanted to
25 iron these things out.

1 This one, I think, we heard a little bit
2 about in voir dire today, the comparison of Frito-Lay's
3 alignment system to Defendants' alignment system for
4 purposes of infringement.

5 The Court overruled that, I think, and
6 gave a -- gave a limiting instruction, but, Your Honor,
7 Frito-Lay objects to that presentation of that sort of
8 argument.

9 THE COURT: And that's overruled. I've
10 already given the jury a limiting instruction on that.

11 MR. DURST: And that is -- Your Honor,
12 the Court -- the Court gave a limiting instruction on
13 that and then issued -- this is the one on which the
14 Court issued a separate opinion and allowed it in for
15 certain purposes.

16 Our objection, Your Honor, just to be
17 clear for the record, Frito-Lay's objection to that is
18 that that type of comparison is improper for any
19 purpose, including willful infringement.

20 THE COURT: It's overruled.

21 MR. DURST: And the side-by-side
22 comparison of the accused products, the SCOOPS!, in
23 other words, the chips and SCOOPS!, a side-by-side
24 comparison of that, Your Honor.

25 We believe that is not in keeping with

1 the proper legal standards, and I expect that argument
2 in opening statement tomorrow, Your Honor, and I -- we
3 object to that.

4 THE COURT: That will be overruled.

5 MR. DURST: The use of monopoly and
6 monopolist, also, Your Honor. We heard that in voir
7 dire. I think we're going to hear it again tomorrow.
8 We object to the use of that term in argument as it's
9 improper in this context.

10 THE COURT: Overruled.

11 MR. DURST: And the last one, Your Honor,
12 is with respect to the market for bowl-shaped chips. So
13 you heard a little bit in voir dire about where that
14 argument is going to go, and there was examination of
15 potential jurors about the effect on the market of
16 competition.

17 Your Honor, any suggestion that the
18 verdict by this jury will do anything other than impact
19 the products offered by these Defendants, we believe is
20 improper, and we moved in limine on that.

21 The Court limited the evidence that
22 Defendants can offer -- the arguments that Defendants
23 can offer to bowl-shaped chips, but we believe that
24 limitation is not enough, that their argument -- they
25 want to argue, I believe, Your Honor, that all

1 bowl-shaped chips will be excluded from the market.

2 We believe that's improper from the
3 perspective that the only chips that are going to be
4 impacted by this jury's verdict will be these chips
5 offered by the Defendants.

6 MR. HILL: And that's the same issue you
7 ruled on in writing over the weekend, Your Honor, and --

8 THE COURT: I just realized I haven't
9 been asking you for any responses.

10 MR. HILL: Well, if the Court is staying
11 with its prior rulings, I have no responses.

12 THE COURT: I'm going to overrule that
13 objection.

14 MR. DURST: Those are the ones I wanted
15 to raise, Your Honor.

16 THE COURT: Very good.

17 Yours? Anything further from Defendants?

18 MR. HILL: There is one thing, Your
19 Honor. As far as trial objections, we'll object at
20 trial. And I hope once we're past opening statements,
21 that that's -- there won't be pre-objection or
22 post-objection as a way to try to preserve a record you
23 didn't preserve at the time.

24 That's what we're -- the process was just
25 concerning me a little as I thought about the

1 implications, Your Honor.

2 THE COURT: Well, we had some extra time,
3 and anyone -- all these things will come in in the
4 morning, so -- I do this a little bit differently, and
5 so he just didn't want to have to stand up and object.
6 I'm sure if something comes up, I'll let either side
7 make a record after the fact of additional items that
8 come up so they have all the records preserved.

9 MR. HILL: Okay.

10 THE COURT: I'm not trying to inhibit
11 anybody's ability to preserve a record and do it in the
12 most efficient way that we can.

13 MR. HILL: Thank you, Your Honor.

14 There is one other issue the parties have
15 discussed this morning that we never have put on the
16 record, and we need to, and it's with regard to Claim
17 16.

18 Plaintiff is abandoning Claim 16 as we
19 discussed with the Court this morning, and Defendants
20 are abandoning without prejudice -- all without
21 prejudice here, their invalidity and inequitable conduct
22 allegations, affirmative defenses as to all claims.

23 THE COURT: I guess you'll have to file
24 things unless you --

25 MR. DURST: We will. We have not done so

1 yet.

2 MR. HILL: We have not done so. We
3 thought it may be more efficient to just state on the
4 record that those claims are dismissed without prejudice
5 and be done with it.

6 THE COURT: Whatever y'all's pleasure
7 is going to be --

8 MR. HILL: That's our pleasure.

9 THE COURT: -- from my perspective, so...

10 MR. DURST: It will go quicker if we do
11 it right here. I'm not sure that's the best way to do
12 it, but it will go quicker if we do it right here.
13 So I understand that the stipulation is that Frito-Lay
14 will dismiss without prejudice its claim against
15 Defendants Ralcorp and Medallion that they infringe --
16 that their process infringes -- or their product, for
17 that matter, infringes Claim 16 of the '344 patent and
18 that the Defendants are dismissing without prejudice all
19 of their defenses related to Claim 16, including the
20 validity -- invalidity and also the defense of
21 inequitable conduct with respect to the patent.

22 MR. HILL: And, Your Honor, that's -- the
23 dismissal of our invalidity case is across the board.
24 It's not simply to Claim 16.

25 THE COURT: Right. That's what I --

1 MR. HILL: It's dismissal without
2 prejudice of all claims -- all affirmative defenses of
3 invalidity or inequitable conduct.

4 MR. DURST: And unclean hands, I think is
5 in your list of defenses.

6 MR. HILL: And unclean hands as well.
7 Yeah, to the extent it relates to Claim 16 on unclean
8 hands.

9 Do we have an unclean hands defense on
10 Claim 1 or anything else? No?

11 Oh, the unclean hands defense, Your
12 Honor, goes to more than just the patent claims. That's
13 the distinction we're trying to draw. In terms of the
14 other claims that the Plaintiff has made, state law
15 claims, as well as the other trademark-related claims,
16 that's a portion of our unclean hands defense.

17 So we're not turning loose anything
18 outside the patent context.

19 THE COURT: Okay. So -- essentially, so
20 the record is clear, you're dismissing all invalidity
21 contentions and all other inequitable or unclean hands
22 as it relates to the patent.

23 MR. HILL: As relates to the patent.

24 That's correct, Your Honor. All without
25 prejudice.

1 THE COURT: Essentially, defenses to any
2 other claims, you're still asserting?

3 MR. HILL: Correct.

4 MR. DURST: And to be clear, this
5 stipulation relates to claims, defenses, and
6 counterclaims. They had filed some counterclaims.

7 MR. HILL: Correct. That's correct, Your
8 Honor, all dismissed without prejudice.

9 THE COURT: Mr. Durst, is that your
10 understanding?

11 MR. DURST: That is my understanding as
12 well.

13 THE COURT: And you realize -- you'll see
14 the transcript later, and if there's a problem, I'm sure
15 you'll follow it up, and we can correct the record and
16 make sure it's all clear. I try, again, to be
17 user-friendly, so in any way I can help.

18 MR. WARD: And the last thing, Your
19 Honor -- and I don't think we have filed anything on
20 this, but we had filed an emergency motion, and then the
21 Plaintiff has filed a response.

22 We aren't intending to file a reply, so I
23 didn't know if you want to hear argument. At some
24 point, that's going to become an issue when we start
25 presenting evidence.

1 THE COURT: Raise it at 4:00 o'clock. I
2 think y'all filed it on Sunday or -- so I'll let y'all
3 go ahead -- if you want to make a record, that's fine.
4 We can discuss that now.

5 MR. WARD: Your Honor, we've got the --
6 the dispute is really pretty much narrowed down to two
7 areas.

8 One is whether or not the Plaintiffs need
9 to make their response in the form of an answer to the
10 interrogatory, which is where we thought we were before
11 we got the Court's order, and we are seeking
12 clarification on that.

13 And then there were three items that
14 we're asking for some additional detail on, and that was
15 attached as an exhibit, and it's included in the body of
16 the motion. And that's these additional 19 areas that
17 they specify in the supplemental brief that they filed.
18 One is Frito-Lay's specifications, configuration, and
19 design and integration of its corn soaking, cooking, and
20 washing equipment, and they cite to a number of
21 depositions, which my understanding from the discussion
22 on the record was that telling us to go look in
23 depositions is not what the Court was ordering them to
24 do. They needed to tell us what the trade secret was.
25 The second one is how Frito-Lay operates its tortilla

1 chip lines, which covers all tortilla chip lines,
2 apparently, not just SCOOPS! And if they were limiting
3 it to SCOOPS!, what is it about the operation of that
4 SCOOPS! line that is a trade secret.

5 And then the final one is knowledge of
6 how Frito-Lay cooks its corn, because in Dr. Okos'
7 report, the trade secret that was claimed was that
8 Frito-Lay's research and development does not set corn
9 cook times.

10 And we had dealt with that trade secret
11 claim head on, and now the claim is apparently knowledge
12 of how Frito-Lay cooks its corn, and we're not sure
13 exactly what specification with respect to how it's
14 cooking its corn has been claimed as a trade secret.

15 THE COURT: Mr. Durst?

16 MR. DURST: Yes, Your Honor. I'm looking
17 at the ones he flagged here.

18 So, Your Honor, we complied with the
19 Court's order on Friday evening, which was to list the
20 trade secrets. We complied that -- with that and went
21 above and beyond and gave some examples of where those
22 trade secrets were discussed in the evidence that has
23 been designated for trial.

24 Mr. Ward's commentary and concern now is
25 not that we didn't list them, which was the Court's

1 order. We satisfied that. That was the motion in
2 limine that they raised on Friday, and that's been
3 satisfied.

4 And now he's apparently not satisfied
5 with the list that we gave and wants to take issue with
6 the additional information we provided, which was not
7 even required by the Court's order.

8 This is a discovery dispute, Your Honor.
9 All of this information has been disclosed.

10 As far as Mr. Ward is concerned about
11 looking through the documents, I told him then -- this
12 over the weekend, and I think it's clear from our
13 papers, that the deposition testimony, for instance, of
14 Mike Trowbridge on the Frito-Lay's specs,
15 configurations, et cetera, for corn washing and cooking
16 equipment.

17 The deposition of Mike Trowbridge, the
18 portions in that that we intend to rely on have been
19 designated for trial testimony for a couple of weeks
20 now, and that's true throughout.

21 So we gave them -- we've given them
22 page/line descriptions. We've given them trial exhibit
23 numbers. And I think we've gone above and beyond what
24 the Court ordered. This is evolving back into a
25 discovery dispute.

1 THE COURT: Mr. Durst, what about the
2 issue -- the Defense raised an issue regarding it's not
3 an interrogatory format in terms of being verified. But
4 is that -- I assume that you are going to have no
5 objection to them taking that document and saying to the
6 jury this is their official position on this?

7 MR. DURST: I do have objection to that.
8 That's -- I do have an objection to that. They need to
9 be addressing the evidence in the case. If they wanted
10 a sworn interrogatory response or any interrogatory
11 response on this, they should have moved to compel back
12 during the discovery period.

13 So what the Court is positing, I suspect,
14 is exactly what the Defendants have in mind. They want
15 to put up a list on the ELMO and check through them.
16 And our -- and our allegations of trade secret
17 infringement, Your Honor, will be the evidence that is
18 presented to the Court through the witnesses and the
19 documents that will be presented, and that's the --
20 that's the list of trade secrets that will be proven up.
21 That addresses the list.

22 Does the Court have a question about the
23 verification too? The Court understands the issue of
24 verification, I think.

25 THE COURT: Well, I guess -- go ahead,

1 Mr. Ward.

2 MR. WARD: Well, I was going to tell the
3 Court that we didn't have a problem with the
4 verification so long as there wasn't some argument that
5 we couldn't stand up and confront witnesses with what
6 Frito-Lay was claiming were its trade secrets or telling
7 the jury what they were claiming now as trade secrets.

8 So I guess we don't have the list of what
9 the trade secrets are, if we're not able to stand up and
10 check them off as we go through this trial. That was
11 the whole purpose of this exercise, I thought was to put
12 us on notice of what they were going to claim as a trade
13 secret.

14 I just wanted it in a format that we can
15 use, that we can defend ourselves, and we can
16 cross-examine witnesses with.

17 MR. DURST: Your Honor, I don't have any
18 problem with him using this document as a reference
19 point for his examination of our witnesses. What I do
20 have an objection to is this document being displayed to
21 the jury. It's not proper to do that.

22 If they wanted that sort of documentation
23 and list shown to the jury, we should have had this
24 discussion 60 days, not the morning before the trial.

25 So, Your Honor, in short, we've complied

1 with the Court's order. We've given them, we think,
2 more than they're -- more than they're entitled to. I
3 went above and beyond even what the Court ordered us to
4 do on Friday.

5 MR. WARD: And, Your Honor, just to be
6 clear, we attached the transcript of that hearing, and
7 I'll quote it to the Court. And this is Mr. Siebman
8 after the Court had ruled. Mr. Siebman said: Your
9 Honor, it's our understanding the Court has ordered us
10 to answer that interrog, the supplemental answer to that
11 interrogatory, and that's exactly what we're going to
12 do.

13 That was the discussion that we had, and
14 that's where we thought the lay of the land was on
15 Friday. And then the order came out talking about a
16 supplemental brief, and now it sounds like they are
17 using that as an opportunity to wiggle and say, well,
18 you can't limit us to what we've told you in this
19 supplemental brief, which is exactly what we're
20 concerned about.

21 MR. SIEBMAN: Your Honor, the context of
22 that was Mr. Ward was going beyond the scope of the
23 interrogatory. It had nothing to do with the
24 verification. He was going beyond the scope of the
25 interrogatory and continuing to add more and more

1 information about what was going to be required. And
2 that was a limiting comment to the scope of what the
3 Judge was requiring us to provide.

4 THE COURT: All right. I will tell
5 you -- I mean, I'm overruling -- it is what it is, so
6 I'm not going to expand upon it. The question is
7 that -- I guess my original intent was for you to
8 supplement and give a new interrogatory and then somehow
9 I changed that when I did the written order. I hate
10 when that happens. I know what caused the confusion
11 now.

12 In terms of the matter, I'm not going to
13 retrod that background at all. But the only thing is
14 that I guess when I wanted you to read something in the
15 interrogatory, was they should have the ability to use
16 that in front of the jury. That's the only thing, let
17 them know what the allegations of the trade secrets are.

18 So, Mr. Durst, I'm not asking you to
19 expand upon that at all in terms of subject matter on
20 what you've given. I'm overruling their objection to
21 that and deny it as to that.

22 The confusion, which is partly caused by
23 the Court, was the intent you supplemented the
24 interrogatory, which they could use an interrogatory in
25 answer to the jury. And so you're telling me you don't

1 want them to use this. So I'm at a loss to say that I
2 could maybe go ahead and supplement the interrogatory,
3 which I originally intended you to do.

4 It's the same subject matter. I'm not
5 asking you to change the subject matter, but you're
6 telling me you're objecting to their ability to use that
7 to the jury. Now that they have an answer they could
8 actually use however they wanted to use it, it was an
9 interrogatory answer.

10 MR. DURST: Your Honor, if they wanted
11 the interrogatory answer, they have our supplemental
12 interrogatory response, which covers this same turf.
13 It's not as specific as we talked about on Friday. It
14 covers the same subject matter, though.

15 Your Honor, if they wanted an
16 interrogatory response, they needed to do it in time.
17 They needed to do it on time. What they are trying to
18 do is adjust the evidence in the way the case is tried
19 based on a discovery dispute that they raised at the
20 pretrial conference on the document that they've had for
21 60 days. And we object to that, Your Honor.

22 THE COURT: I understand that, but my
23 original intent -- and somehow I changed it in the
24 written order, and, again, it's my mistake, so we make
25 mistakes sometimes. But it was always my intention that

1 clearly from the transcript of the hearing that was the
2 intent, that I wanted you to supplement the
3 interrogatory.

4 Was there some confusion regarding that?

5 MR. DURST: No, Your Honor. That was the
6 conversation on Friday, and the order said supplemental
7 brief. We filed a supplemental brief. I mean, it's --
8 the Court has articulated the facts right.

9 THE COURT: So I guess I'm going to ask
10 you this: This is a bit -- if I hadn't made a mistake
11 in the order in saying it should be a supplementation of
12 the interrogatory, would your interrogatory answer be
13 different than what you submitted in the supplemental
14 brief?

15 MR. DURST: The substance would not be
16 any different, Your Honor.

17 THE COURT: So, again, was -- what's the
18 problem? Because if I had made a mistake, you would
19 have done it -- the interrogatory supplemental, the same
20 information, allowing them to use the same supplemental
21 brief.

22 MR. DURST: Your Honor, we are, of
23 course, going to do what the Court orders us to do.

24 THE COURT: No, I know that. I'm just
25 trying to -- I made a mistake in the way when I signed

1 the order that I shouldn't have signed, because that
2 wasn't the Court's intent. And you understood what the
3 Court's intent was in supplementing the interrogatory,
4 which is something they could use in front of the jury,
5 if they so chose to do. That's their decision whether
6 to use that or not.

7 I'm not quibbling with and I'm overruling
8 their objection as they wanted more detail they wanted
9 you to provide in a supplemental brief. It's not in a
10 format that they wanted to use it for purposes for the
11 trial, and that's not what the Court's intent was. And
12 I'm confessing that I made an error when I signed the
13 order changing that from a supplementation of the
14 interrogatories, so...

15 MR. DURST: We're not trying to exploit
16 the -- any -- any situation of the Court in terms of the
17 chosen words.

18 This debate, though, Your Honor, is
19 unending. With the claim language in the motion in
20 limine they intended to ambush us and try to handcuff us
21 on trade secrets we could try. The Court ordered us to
22 provide a list. We provided a list.

23 THE COURT: Your list is probably wide
24 open that allows you pretty -- I mean, based on the list
25 you provided in the supplemental brief, you're not going

1 to try the case you wanted to try?

2 MR. DURST: No, Your Honor, I'm not. I
3 think that list gives us -- we have identified in the
4 list the --

5 THE COURT: I contend that's sufficient.
6 I'm overruling their objection as to anymore detail. I
7 just want it in a form, and so -- we're having this
8 discussion, because you've objected to their use of the
9 supplemental brief, how they want to use it in front of
10 the jury. And so you told me the substance isn't
11 changing.

12 MR. DURST: We'd just like --

13 THE COURT: If you put it in an
14 interrogatory format, if you feel more -- if you would
15 feel better about doing it that way. Just supplement it
16 and give it to them in that format. The same
17 information is fine. I'm not asking you to change the
18 information.

19 Again, I'm going to overrule the
20 objection as to that. But that was the Court's
21 intention, and I'm the one that made the mistake in the
22 order.

23 MR. DURST: So, Your Honor, the quickest
24 way through this is that -- perhaps, is I'm going to
25 object to this being shown to the jury under these

1 circumstances, whether it's in interrogatory response or
2 a supplemental brief. That part of the objection is not
3 going to change.

4 The lawyers have been working pretty hard
5 in this case. If the outcome is going to be the same,
6 the Court is going to order that they can show it to the
7 jury, there's no difference to me whether you order that
8 they show the brief to the jury or the interrogatory,
9 except this: I would just assume save my team another
10 30 or 45 minutes or an hour, or whatever it will take
11 us to get this thing turned into an interrogatory.

12 THE COURT: That's fine from my
13 standpoint. I mean, as long as they're able to use it,
14 and it's like any discovery response that are admitted
15 in trials all the time.

16 MR. WARD: Just so long as I don't hear
17 that it's not Frito-Lay's position as this trial goes
18 on.

19 THE COURT: I understand. That's clearly
20 their position. They're not waivering from -- those are
21 the trade secrets. They all -- all the trade secrets
22 we're arguing about began with that supplemental brief.

23 MR. DURST: Yes, Your Honor. That's our
24 intention. I will tell you this: Every time we've
25 examined one of their witness, they surprise us with

1 more. And they're going to call some live witnesses and
2 happily we get to cross-examine them. So with that
3 reservation --

4 THE COURT: Mr. Durst, if their witnesses
5 give you new information that's never been disclosed
6 before, that's fair game in my mind. If they offer
7 trade secrets that have not come out in any of the
8 depositions, then that's fair game for you. So
9 that's -- I'm not restricting your ability to do that.

10 What else?

11 MR. WARD: Nothing from the Defendant
12 that I know of.

13 MR. DURST: I think that's all from us
14 too, Your Honor. Thank you very much for your time.

15 THE COURT: That's fine. Maybe I'm too
16 user-friendly.

17 What I will tell you is we'll start at
18 9:00 o'clock in the morning. If there are disputes,
19 which invariably -- y'all are so friendly with each
20 other, but invariably there will be disputes. Just be
21 here at 8:30 and talk to each other. I try to minimize
22 the time of the jury so we can start at 9:00 o'clock.

23 So if there are any issues you need to
24 bring to the Court's attention, we can start at 8:30 and
25 get those resolved before 9:00 o'clock.

1 MR. HILL: Your Honor, one question. All
2 of the slides we have --

3 THE COURT: Can you just go --

4 MR. HILL: I'm so sorry, Judge.

5 All of the stuff that we have in the
6 courtroom, can we leave it here overnight?

7 THE COURT: Yes. The courtroom will be
8 locked after the cleanup crew comes through. That's not
9 a problem. And then we're here -- the court security
10 officer will be here tomorrow around 7:00. You can
11 leave all your stuff as you see fit.

12 MR. DURST: Your Honor, you had requested
13 copies of the expert reports, and we have prepared
14 copies of our expert witnesses who have submitted
15 reports in the case, Dr. Van Liere, Mr. Phillips, Dr.
16 Okos has two reports, Dr. Floros, and Professor Visser.
17 And so if I may, I'm going to have one that -- do you
18 need more than one copy?

19 THE COURT: I just need one. I will
20 review it.

21 Are we going to have any experts
22 tomorrow?

23 MR. DURST: We will not.

24 THE COURT: Okay. Just kind of give me
25 the heads-up, so I want to be able to read them as I

1 need to.

2 MR. HILL: Your Honor, we have ours here
3 in the courtroom in boxes, but rather than burden your
4 time, we will dig them out and give them to you first
5 thing in the morning.

6 THE COURT: That's all right. I won't
7 need them till the second week, so...

8 MR. WARD: Thank you.

9 THE COURT: And then review each of the
10 exhibits so we can get that all -- so there are no
11 problems when I admit all the exhibits.

12 MR. WARD: Yes.

13 THE COURT: Y'all have a good evening,
14 and we will see you in the morning.

15 COURT SECURITY OFFICER: All rise.

16 (Court adjourned.)

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CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

/s/_____
JUDITH WERLINGER, CSR
Official Court Reporter
State of Texas No.: 731
Expiration Date 12/31/14

Date

/s/_____
SUSAN SIMMONS, CSR
Official Court Reporter
State of Texas No.: 267
Expiration Date 12/31/14

Date